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Supreme Court of the United States

October Term, 1973
No. 73-396

WALLACE REED, *et al.*,

Petitioners,

vs.

ROGERS C. B. MORTON, Secretary of the Interior, *et al.*,

Respondents.

UNITED STATES OF AMERICA,

Respondent,

vs.

HOOD CORPORATION, *et al.*,

Petitioners.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

MEMORANDUM FOR THE PETITIONERS IN REPLY.

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IN THE

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MEMORANDUM FOR THE PETITIONERS IN REPLY.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners herein have prayed for a Writ of Certiorari to review the decision of the Court below. In its opinion, the United States Court of Appeals for the Ninth Circuit departed radically from prior decisions by this Court, itself and by the Eighth Circuit. The

Ninth Circuit also departed radically from established principles of appellate review by briskly overturning the detailed findings of the District Court in favor of conclusions shockingly inconsonant with the evidentiary record compiled at trial. If left standing, this contrary decision will sanction the most arbitrary and capricious conduct by the Department of the Interior. Its distortion of established law will disrupt the efforts of future entrymen upon desert lands to the frustration of the manifest desire of Congress that millions of barren desert acres be made fruitful through irrigation. For all these reasons, Petitioners have sought certiorari.

The Government's Memorandum in Opposition utterly fails to come to grips with Petitioners' arguments. Instead, that Memorandum depicts as well-settled law a position supported in no other decision except the opinion of the Court below—a position "legislating" provisions into the Desert Lands Act of 1877* which Congress expressly excluded on several occasions. The Government's Memorandum characterizes as the mere "view" of Petitioners "properly rejected below" a history of decisions of this Court and of the Eighth and Ninth Circuits, all of which bound the discretion of the Department of the Interior to limits prescribed by statute [Gov't Memorandum 7].

The Government's arguments should be addressed to Congress and not to this Court. Those arguments are based on the Desert Lands Act of 1877 as the Government wishes it had been written; they are not based on the Act as it was enacted and thereafter interpreted. The Government claims for the Secretary of the Interior a roving commission and unfettered power—unguided

*19 Stat. 377, as amended, 43 U.S.C. 321, *et seq.*

by legislative standards, the Administrative Procedure Act, traditional notions of due process—and in disregard of the statute being administered. For all these reasons, Petitioners are compelled to make this reply.

I.

The Court of Appeals' Decision Conflicts With Long-Standing Authorities and Installs in the Desert Lands Act of 1877 Additional Requirements on Entrymen Never Adopted by Congress and Rejected by Courts.

In its opinion interpreting the requirements made upon persons wishing to enter and claim desert lands, the Court of Appeals for the Ninth Circuit *expressly* noted that its decision was in complete conflict with that of the Eighth Circuit in *United States v. Mackintosh*, 85 Fed. 333 (8th Cir. 1898) [See Pet. App. 148*].

The Government's Memorandum in Opposition resolutely ignores this portion of the Court's opinion and suggests there is no conflict between *Mackintosh* and that opinion. The Government's reasoning to that conclusion is specious; the conflict is polar, as Petitioners will demonstrate.

Under the Desert Lands Act of 1877, as amended, any citizen, but not a corporation, may enter and reclaim 320 acres of designated desert lands by filing a declaration of his intention to irrigate said lands within three years, an irrigation plan showing the water source, and paying a filing fee. The entryman's further tasks are specified in 43 U.S.C. 329:

> "At any time after filing the declaration, and within the period of four years thereafter, upon

*Petitioners' separately-bound Appendix of the decisions below, filed with the Petition for Writ of Certiorari.

making satisfactory proof to the officer designated by the Secretary of the Interior of the reclamation and cultivation of said land to the extent and cost and in the manner aforesaid, and substantially in accordance with the plans herein provided for, and that he or she is a citizen of the United States, and upon payment to such officer of the additional sum of $1 per acre for said land, a patent shall issue therefor to the applicant . . ."

It is the argument of Petitioners and the Eighth Circuit in *United States v. Mackintosh,* 85 Fed. 333 (8th Cir. 1898), that the Government may impose *no additional* requirements on entryman beyond those catalogued in the Desert Lands Act. At the time of final proofs, of course, the Government may challenge the declarations of an entryman to assure compliance with the statute. Petitioners, notwithstanding the intimation of the Government's Memorandum, never argued that challenges to statutory compliance are not permitted or that events relevant thereto may not be inquired into at the time of final proofs. *Mackintosh* supports this view fully.

However, the Government may not go beyond the statute and may not require in final proofs that an entryman declare any executory understandings or contracts to sell his desert entry after receiving his patent. The Government displays no authorities for the converse of this proposition, and *Mackintosh* fully supports the position of Petitioners on this matter.

In *Mackintosh,* after issuing a patent to an entryman, the Government sought its cancellation for noncompliance with the Desert Lands Act and for an alleged conspiracy with a corporation to acquire lands

for the benefit of the corporation and thereafter transfer them to the corporation.

The Government asserted Mrs. Mackintosh failed to comply with the statute in three respects. The filing fee and purchase price were alleged to have been paid by the corporation, the amount of reclamation work performed was falsely declared to have been sufficient, and finally it was asserted that Mrs. Mackintosh had failed to reveal that from the time of initial entry she was the agent of a corporation. The District Court rejected all three assertions by the Government as unproved after a lengthy trial. The Eighth Circuit affirmed, after reviewing each claim and the evidence adduced at trial thereon.

The Government, however, was not satisfied merely with compliance with the statutory requirements. The Government alleged in novel fashion that Mrs. Mackintosh's patent should be cancelled because she had conspired with the corporation "in contravention of the spirit of the statute" (85 Fed. 333, at 338) before receiving her patent to transfer her lands as soon as they were acquired to the corporation. The Government insisted that Mrs. Mackintosh should have revealed her plans, later consummated, to sell the lands after patent to the corporation. Her failure to so declare was charged to be a misrepresentation in final proofs.

The Eighth Circuit rebuffed the Government's efforts to impose an additional requirement upon an entryman which Congress had not legislated, holding that:

> "In the search after fraud, the inquiry must be limited to such matters as the statute requires to be established in making the final proof." 85 Fed. 333, at 337.

The Court went on to explain there was no statutory foundation for the Government's demand for this additional disclosure at the time of final proofs:

> "There is nothing in the statute denouncing a mere intention on the part of the locator to transfer his or her title, when perfected, for the benefit of even a corporation, when the locator pays the purchase money and complies with the requirements of the statute respecting irrigation. In such a case, if the patent be issued to her, she could transfer to whom she pleased. As said by Mr. Justice Brewer, in *United States v. Budd,* 144 U.S. 163, 12 S.Ct. 577:
>
> > 'The Act does not in any respect limit the dominion which the purchaser has over the land after its purchase from the Government, or restrict in the slightest his power of alienation. . . . If, when the title passes from the Government, no one save the purchaser has any claim upon it, or any contract or agreement for it, the Act is satisfied.' " 85 Fed. 333, at 338.

In holding that the Government may not require an entryman to make additional declarations regarding executory arrangements to transfer desert lands after patent, the Eighth Circuit was deciding a question much more fundamental than superficially appears: The Eighth Circuit was placing the Department of the Interior on notice that the Desert Lands Act was to be observed in precise accord with its terms as prescribed by Congress; new requirements were not to be administratively engrafted thereon.

It is apparent from decisions following *Mackintosh* that public lands administrators frequently have sought to exercise powers not allotted them—and as frequently have been admonished by the appellate courts.

Thus, in *Adams v. Church*, 193 U.S. 510 (1904), a similar case to *Mackintosh* arising under the Timber Culture Act of 1878, the Supreme Court restrained the Department of the Interior from increasing the statutory requirements:

> ". . . [W]e find nothing in the fact that, during his term of occupancy, he has agreed to convey an interest, to be conveyed after patent issued, which will defeat his claim and forfeit the right acquired by planting the trees and complying with the terms of the law. Had Congress intended such result to follow from the alienation of an interest after entry in good faith, it would have so declared in the law.
>
> "To sustain the contentions of the plaintiff in error would be to incorporate by judicial decision a prohibition against the alienation of an interest in the lands not found in the statute or required by the policy of the law upon the subject." 193 U.S. 510, at 516-517.

Subsequently, the Supreme Court repeated these views of administrative authority, applying them to the Timber and Stone Act of 1878, as amended. In *Williamson v. United States*, 207 U.S. 425 (1908), the Court declared:

> ". . . [I]t cannot possibly be held, without making by judicial legislation a new law, that the statute exacts from the applicant a reiteration, at

> the final hearing, of the declaration concerning his purpose in acquiring title to the land, since to do so would be to construe the statute as including in the final hearing that which the very terms of the statute manifests were intended to be excluded therefrom." 207 U.S. 425, at 459-460.

The Supreme Court went on:

> ". . . [T]his power [to effectuate the provisions of the Timber and Stone Act by regulations] must in the nature of things be construed as authorizing the Commissioner of the General Land Office to adopt rules and regulations for the enforcement of the statute, and cannot be held to have authorized him by such an exercise of power, to virtually adopt rules and regulations destructive of rights which Congress had conferred." 207 U.S. 425, at 462.

Williamson was approved and discussed at length by the Supreme Court in *United States v. Biggs,* 211 U.S. 507 (1909), to the same effect.

The Eighth Circuit, twenty-one years after *Mackintosh,* re-emphasized its views. Citing *Adams* and *Williamson,* the Court in *United States v. Valley Land & Investment Co.,* 258 Fed. 93 (8th Cir. 1919), blocked the Department of the Interior from imposing its own requirements upon entrymen and commented:

> ". . . [A]nd as there was no requirement concerning the making in the final proof of an affidavit as to the particulars referred to, he was under no obligation to make such an affidavit, and had full power to dispose ad interim of his claim, upon the final issue of patent, the motive of such applicant at the time of the final proof was irrelevant." 258 Fed. 93, at 102-103.

The Eighth Circuit continued:

> ". . . [T]herefore, the inquiry of the court could not extend beyond the good faith and the truth of the statements in the affidavit required by the provisions of the law of the entryman at the time of making his entry." 258 Fed. 93, at 103.

The force of *Mackintosh* lies, then, in its representative status. As a decision involving the Desert Lands Act in facts not dissimilar from those at bar, *Mackintosh* stands for all those decisions confining the Department of the Interior to the terms of the laws they are to administer, denying the Department any authority to impose further requirements upon entrymen. The Court below, however, would permit the Department to make additional requirements [Pet. App. 150-151].

The conflict between *Mackintosh* and the opinion of the Court below is not to be turned aside by a narrow reading of facts as the Government suggests, nor by the Government's statement that *Mackintosh* was decided prior to the 1891 and 1908 amendments to the Desert Lands Act [Gov't Memorandum 7, n.6]. *Mackintosh* was decided in 1898, sometime after the first amendments. The later amendments merely restrict the assignment of entries before patent; *Mackintosh* dealt with a quite different topic: arrangements for conveyance of lands after patent.

The Government's Memorandum has failed to address the conflict between circuits posed by *Mackintosh* and the decision below. It is appropriate to take note the decision below was also in conflict with prior decisions of the Ninth Circuit, none of which were even *mentioned* in the opinion below, despite extensive briefing by Petitioners.

In *United States v. Barber Lumber Co.*, 194 Fed. 24 (9th Cir. 1912), a decision construing the Timber and Stone Act, the Court noted:

> "Before entering upon a consideration of the legal conclusions to be drawn from the facts, it will be well to take our bearings in the law applicable thereto as we find them in a series of decisions of the Supreme Court. *United States v. Budd*, 144 U.S. 154; . . .; *Williamson v. United States*, 207 U.S. 425; *United States v. Biggs*, 211 U.S. 507." 194 Fed. 24, at 29.

The following year, the Ninth Circuit again construed the Timber and Stone Act precisely according to its terms in *United States v. Kettenbach*, 208 Fed. 209 (9th Cir. 1913):

> ". . . In these decisions, the law has become well settled that the act does not in any respect limit the dominion which the purchaser has over the land after its purchase from the government, or restrict in the slightest his power of alienation; that all that it denounces is a prior agreement, the acting for another in the purchase; . . . *United States v. Budd*, 144 U.S. 154; *Williamson v. United States*, 207 U.S. 425.
>
> "In the cases which we now have before us for decision, the testimony is very voluminous. A great portion of it relates to acts of the entrymen, and of the defendants, or some of them, at the time of making final proof, or prior to that time and subsequent to the making of the original application to purchase the land. *Under the decisions just referred to, this testimony was only admissible and can only be considered by*

this court in so far as it tends to establish the fraudulent purpose of the entrymen with respect to the land in controversy at the time of the original application." 208 Fed. 209, at 214. (Emphasis added).

In *Connor v. United States,* 214 Fed. 522 (9th Cir. 1914), the Ninth Circuit interpreted the Desert Lands Act, *as amended.* It approved the opinion of the Eighth Circuit in *Mackintosh* as an accurate statement of the law. Ironically the *Connor* opinion also quotes a decision by the Secretary of the Interior, rendered after *Mackintosh,* which quotes from *Mackintosh* approvingly. [Case of Alonzo B. Cole, 38 L.D. 420].

In light of the extensive support given by the Ninth Circuit in *Barber Lumber, Kettenbach* and *Connor* to the rationale and holding of *Mackintosh,* for the Ninth Circuit in the opinion below merely to "decline to follow" *Mackintosh,* without further comment on the Supreme Court decisions in *Adams, Williamson* and *Biggs,* and without mention of the previous Ninth Circuit decisions quoted herein, is a dismaying departure from *stare decisis* [See Pet. App. 148].

The Court below peered so intently at selected testimony from the trial record it lost sight of the forest for the trees. Its concentration on the Land Department's interpretation of the 1891 Desert Lands Act amendments, later approved in *United States v. Hammers,* 221 U.S. 220 (1911), led it to imagine that assignment of entries before patent was somehow involved in the case at bar [See Pet. App. 149-150].

The District Court found to the following effect:

> "The contractual arrangements between Hoodco Farms, Inc., the entrymen and Indian Hill

Irrigation Company, did not constitute assignments of the desert entries to Hoodco Farms, but rather constituted a legal and proper financing plan for the joint development of the entries." [Pet. App. 124].

The Court below makes no reference to the detailed testimony upon which that District Court finding was based.

As the Court below failed to recognize, it is not a part of the Desert Lands Act for the Secretary of the Interior to police "arrangements" that do not amount to "assignments." [Pet. App. 150-151]. "Assignments" are transfers of entire interests; financing "arrangements" are not. See, *e.g., United States v. Valley Land & Investment Co.*, 258 Fed. 93 (8th Cir. 1919).

The Court below assumed the existence of fraudulent conduct, disregarding completely the findings of fact of the District Court to the contrary [Pet. App. 116-125], thus disregarding the conclusion of the District Court that the Government had not met its burden of proof of showing fraud [Pet. App. 126-131], and disregarding settled law establishing the stringency of the Government's burden of proof.

In *United States v. Maxwell Land-Grant Co.*, 121 U.S. 325 (1887), the Supreme Court held that testimony in actions to cancel patents must be "clear, unequivocal and convincing"; "it cannot be done upon a bare preponderance of the evidence which leaves the issue in doubt." 121 U.S. 325, at 381. The Court explained the policies underlying this stringency:

> "In this class of cases, the respect due to a patent, the presumptions that all the preceding steps required by the law had been observed be-

fore its issue, the immense importance and necessity of the stability of titles dependent upon these official instruments, demand that the effort to set them aside, to annul them, or to correct mistakes in them, should only be successful when the allegations on which this is attempted are clearly stated and fully sustained by proof." 121 U.S. 325, at 381.

Though the Court below displayed certainty in its decision to a degree possible only by selecting for exposition a minute aspect of the total trial testimony, such certainty does not harmonize with the District Court findings. The District Court conscientiously tried this complex action and received lengthy testimony.

Petitioners submit the findings of the District Court were entitled to far greater deference than was accorded below. This case is similar to *United States v. Valley Land & Investment Co.*, 258 Fed. 93, at 105 (8th Cir. 1919) wherein the Court stated:

> "Admitting that inferences might be drawn from some of the evidence, some of the facts and circumstances in the case, that would indicate an intent and purpose to violate this provision of the Pre-Emption Law, *the position of the trial court becomes especially important. After seeing personally the witnesses, observing their demeanor upon the witness stand, having an opportunity to judge the character and stability of the men, he finds:*
>
> *'These gentlemen impressed me as honest men, as substantial citizens. . . . The men did not hesitate to tell the whole story . . . I think it was an honest transaction.'"* (Emphasis added).

The Court below failed to consider the opportunities for assessing demeanor and credibility available to the District Court and unblinkingly presumed upon the adequacy of the record transmitted.

Most unsettling to Petitioners in the attitude of the Government throughout, an attitude not rejected by the Court below, is the Government's argument that it may cancel patents today, branding as "fraudulent" conduct which was wholly consonant with existing decisions when performed. Innocent behavior is twisted into sinister conduct, all without any awareness by Petitioners—or other entrymen on other desert lands. The Government refuses to recognize the law on which these—and doubtless many other—entrymen relied in investing millions of dollars of improvements.

For the Government in its Memorandum to fail to come to grips with the arguments of Petitioners but to rely instead upon a tortured and narrow understanding of *Mackintosh* is dismaying. For the Government to ignore the District Court's determination that it never met its heavy burden of proof of fraud and to insist such fraud was never in doubt is terrifying. Petitioners sought to conform to the Desert Lands Act as enacted and interpreted for eighty years—only now to find the rules of the game are being changed in the final inning.

II.

Conclusion.

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Ninth Circuit.

November 19, 1973.

Respectfully submitted,

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